Musings on Idea(l)s in the Ethical Regulation of Mediators: Honesty, Enforcement, and Education

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I. INTRODUCTION AND OVERVIEW

As I looked across campus early this morning, I recalled trudging in the snow to 8:00 A.M. classes more than thirty years ago. The Ohio State University campus has changed quite a bit in the thirty plus years since I was a student.[1] Similarly, much has changed in the last thirty years in the development and evolution of the use of mediation.[2] It was literally inconceivable to those of us working in the early days at the Night Prosecutor's Program (NPP)[3] in downtown Columbus that the field of mediation would grow and impact the way people resolve disputes, not only in Ohio[4] or Texas,[5] and throughout the nation,[6] but also from Australia[7] to Brussels[8] and from Argentina[9] to India.[10]

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[1] The author attended The Ohio State University from 1973–1976, B.S., *cum laude.*

[2] The modern mediation movement, commonly recognized to have begun in 1976 with the Pound Conference (*See* Jeffrey Stempel, *Reflections on Judicial ADR and the Multi-Door Courthouse at Twenty: Fait Accompli, Failed Overture or Fledgling Adulthood?*, 11 OHIO ST. J. ON DISP. RESOL. 297, 309–10 (1996)) and the subsequent creation of the three Neighborhood Justice Centers, has been through three decades of growth and evolution. For greater detail in the examination of this movement, see KIMBERLEE K. KOVACH, MEDIATION: PRINCIPLES AND PRACTICE 26–48 (3d ed. 2004).

[3] The Columbus Ohio Night Prosecutor's Program (NPP) was one of the first mediation programs in the United States, having begun in 1971. The mediators were students at Capital University Law School and therefore NPP may have been the very first mediation program utilizing trained law students as mediators.

[4] For example, in Ohio both Capital University Law School and The Ohio State University Moritz College of Law have been leaders in providing education and training in mediation. *See generally* Capital University Law School Center for Dispute Resolution, http://www.law.capital.edu/DisputeResolution (last visited Oct. 13, 2005); The Ohio State University Moritz College of Law, Alternative Dispute Resolution, http://moritzlaw.osu.edu/dr/ (last visited Oct. 13, 2005). In addition, Ohio led the way with one of the first statewide commissions on Dispute Resolution and remains a leader

With such growth, however, also come issues, concerns and responsibilities for practice. Often these matters fall within the rubric of

today. *See generally* Ohio Commission on Dispute Resolution & Conflict Management, http://disputeresolution.ohio.gov (last visited Oct. 13, 2005).

[5] Texas, the state of my residence since leaving Columbus in 1980, is often considered a leader in the field of mediation and was the first state to enact a comprehensive statute which allowed courts to mandate mediation of pending lawsuits. TEX. CIV. PRAC. & REM. CODE ANN. §§ 154.001 *et seq.* (Vernon 2003).

[6] Most, if not all, states now have some form of mediation. While some efforts are more focused in the courts, others have an emphasis on community mediation services. A national organization, the National Association for Community Mediation (NAFCM), was created a few years ago to serve in a coordinator role among all these centers as well as to promote community mediation. For information on NAFCM and its mission, visit its website at http://www.nafcm.org. In addition, there are also jurisdictions which have a focus on specialized applications of mediation, such as family and divorce cases (*see* Craig A. McEwen et al., *Bring in the Lawyers: Challenging the Dominant Approaches to Ensuring Fairness in Divorce Mediation*, 79 MINN. L. REV. 1317, 1368–70 (1995)), and special education (*see* Grace E. D'Alo, *Accountability in Special Education Mediation: Many a Slip 'Twixt Vision and Practice?*, 8 HARV. NEGOT. L. REV. 201, 201 (2003)).

[7] *See* Bond University Faculty of Law Dispute Resolution Centre, http://www.bond.edu.au/law/centres/drc/ (providing an overview of Bond University's program) (last visited Oct. 13, 2005).

[8] Efforts to introduce ADR and particularly mediation throughout Europe have taken place in both the public and private sectors. Independent lawyer mediators have begun to establish practices and the Commission of the European Communities has urged the consideration and use of ADR. COMMISSION OF THE EUROPEAN COMMUNITIES, GREEN PAPER ON ALTERNATIVE DISPUTE RESOLUTION IN CIVIL AND COMMERCIAL LAW 5 (2002), *available at* http://europa.eu.int/eur-lex/en/com/gpr/2002/com2002_0196en01.pdf.

[9] Argentina has integrated mediation use in many ways, particularly in law and business. Several programs are in existence. One program through the Chamber of Commerce was concerned with ethics of the mediators and I assisted with the compilation of a Code of Ethics for Mediators. I also had the opportunity to meet with mediators throughout the country who all appear to share the concern for the difficulties in practice in balancing the various ethical principles. *See generally* JUSTICE STUDIES CENTER OF THE AMERICAS, REPORT OF THE JUSTICE: ARGENTINA (2003), *available at* http://www.cejamericas.org/ (follow "Publications" hyperlink; then follow "report on Judicial Systems" hyperlink; then follow "Argentina" hyperlink; then follow "Alternative Dispute Resolution (ADR) hyperlink) (discussing the increase in the use of mediation in the legal system in Argentina).

[10] For example, the Dispute Resolution Institute at Hamline University School of Law has partnered with the Indian Institute of Arbitration and Mediation to engage in the teaching and training of negotiation and mediation skills through a cross-cultural degree program. The Tri-Continental LL.M. Program, http://www.hamline.edu/law/adr/study_abroad/india_dpiloma_program_in_dispute_resolution.html (last visited Oct. 31, 2005).

regulation. And while numerous methods of professional regulation exist,[11] many of which have been considered by the mediation community,[12] mediators have been concerned with ethics for some time.[13] This article will address three distinct idea(l)s[14] concerning mediator ethics; namely content, specifically honesty, enforcement and education in ethical conduct.

Over the last two decades,[15] much work has been done on the creation,[16] and more recently, the revision,[17] of ethical codes for mediators. These efforts should be commended for moving the field forward, not only with regard to self-regulation, but also in providing an enhanced sense of professionalism within the field.[18] While numerous difficulties have been

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[11] For example, the issue of credentialing or licensure is another topic that has been seriously debated within the mediation community. *See* Charles Pou, Jr., *Assuring Excellence, or Merely Reassuring? Policy and Practice in Promoting Mediator Quality*, 2004 J. DISP. RESOL. 303, 304–05.

[12] The State of Maryland, for example, has most recently conducted a study of the methods of quality control. *Id.* at 317; *see also* Roselle L. Wissler & Robert W. Rack, Jr., *Assessing Mediator Performance: The Usefulness of Participant Questionnaires*, 2004 J. DISP. RESOL. 229, 230–31 (discussing a variety of quality control measures and highlighting, in particular, the use of attorney assessments of mediator skills as a means to determine quality). Other organizations have also spent considerable time addressing these issues. KOVACH, *supra* note 2, at 429–78. One of the difficulties in regulation turns on the definition of mediation. *See* Michael L. Moffitt, *Schmediation and the Dimensions of Definition*, 10 HARV. NEGOT. L. REV. 69, 72–77 (2005). Another difficulty is the determination of who may or may not mediate. Jacqueline M. Nolan-Haley, *Lawyers, Non-Lawyers and Mediation: Rethinking the Professional Monopoly from a Problem-Solving Perspective*, 7 HARV. NEGOT. L. REV. 235, 257–60 (2002); Matthew Daiker, *No J.D. Required: The Critical Role and Contributions of Non-Lawyer Mediators*, 24 REV. LITIG. 499, 505–07 (2005).

[13] For a review of efforts to enact ethical standards for mediators, see Charles Pou, Jr., *"Embracing Limbo": Thinking About Rethinking Dispute Resolution Ethics*, 108 PENN. ST. L. REV. 199, 199–206 (2003) and John D. Feerick, *Toward Uniform Standards of Conduct for Mediators*, 38 S. TEX. L. REV. 455, 456–84 (1997).

[14] I leave it to the readers and other commentators to decide if these ideas are merely a consequence of the musings of a nostalgic mediator or views that may be considered ideals for the profession.

[15] Although the process has been evolving for over thirty years, the first decade or so was primarily concerned with experimental programs, and consequently it was not until programs were in existence that the attention turned to aspects of regulation and, in particular, ethics. KOVACH, *supra* note 2, at 31–34.

[16] Many codes of ethics or standards of conduct have been created. *See* Pou, *supra* note 13, at 203–06.

[17] The "national" code, Standards of Conduct for Mediators, has recently been revised. *See infra* notes 27–30 and accompanying text.

[18] *See* Nancy A. Welsh & Bobbi McAdoo, *Eyes on the Prize: The Struggle for Professionalism*, DISP. RESOL. MAG., Spring 2005, at 13, 13–16 (2005) (noting the

encountered, [19] despite such obstacles codes have been enacted. As a result, in both the United States, as well as throughout the world, a large number of ethical codes and guidelines for mediators are in existence.[20] One of the most widely referenced codes is what is commonly known as the "Joint Code," which was the product of a joint committee formed in 1992[21] consisting of the American Arbitration Association (AAA),[22] the American Bar Association (ABA) Section of Dispute Resolution,[23] and the Society of Professionals in Dispute Resolution (SPIDR) (now known as the Association for Conflict Resolution (ACR).[24] This committee developed a code of

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interrelationship of ethics and the search for professionalism). *See also* Russell G. Pearce, *Teaching Ethics Seriously: Legal Ethics as the Most Important Subject in Law School*, 29 LOY. U. CHI. L.J. 719, 721 (1998) (noting that high ethical standards are essential to professionalism).

[19] For example, the interdisciplinary nature of the field and the inherent flexibility of the process have made it difficult to establish rigid standards. In most settings, mediators are a diverse group, coming from all walks of life. In addition, the absence of one governing body or entity for the entire field of mediation has made regulation difficult, as no real enforcement authority exists. Kimberlee K. Kovach, *Enforcement of Ethics in Mediation, in* DISPUTE RESOLUTION ETHICS: A COMPREHENSIVE GUIDE 111–118 (B. Garth & P. Bernard eds., 2002). The lack of a uniform definition of mediation is another factor adversely impacting the ability to enact standards. Different views of mediation exist, along with immense disagreement about the process. Jeffrey W. Stempel, *The Inevitability of the Eclectic: Liberating ADR from Ideology*, 2000 J. DISP. RESOL. 247, 248–51; Lela P. Love & Kimberlee K. Kovach, *ADR: An Eclectic Array of Processes, Rather Than One Eclectic Process,* 2000 J. DISP. RESOL. 295, 295–97.

There is agreement, however, that mediation is a flexible process and that flexibility is an important advantage of its use, allowing applicability in resolving a wide array of disputes. Adaptations have been made, creating many different or specialized applications of the process and making it difficult to provide a simple framework for the process. These factors contribute to the complications in determining appropriate ethics and standards of practice, especially those with detailed provisions. Pou, *supra* note 11, at 306–07.

[20] *See* Welsh & McAdoo, *supra* note 18, at 18 (noting that, due to the lack of agreement among mediators regarding the fine points of the mediators' work, no consensus on ethics exists). Although I doubt that complete disagreement exists, especially within the framework of the similarities of basic ethical principles, the fact that there is much room for interpretation causes the real differences to emerge.

[21] Feerick, *supra* note 13, at 458 (discussing the work of the first joint committee.

[22] For more information on the American Arbitration Association, visit its website at http://www.adr.org/.

[23] Originally it was the American Bar Association's Standing Committee on Dispute Resolution that was a participant in early drafting and deliberations, as the Section of Dispute Resolution was not created until 1993. Upon its birth, the Section continued the initial work of the committee.

[24] For more information on the Association for Conflict Resolution, visit its website at http://www.acrnet.org.

conduct for all mediators, known as the Model Standards of Conduct for Mediators.[25] Although some criticism of the standards was lodged,[26] these standards have served as a framework for many ethical codes developed thereafter.[27] Over the last three years, efforts to revise these standards produced a new version. The final draft of the revised standards has recently been approved by all three of the participating organizations.[28] These revised standards[29] bring significant improvement, particularly the inclusion of reporter notes, which were not included in the first version.[30] Additional issues, however, must be addressed and I have selected three for discussion.

The three aspects of mediator ethics that I will consider are quite distinct, though clearly related as fundamental elements of ethical practice. The first concerns content matters and specifically the prior omission of an honesty or truthfulness standard. Although the recently revised Standards have now included such a provision, it remains somewhat nebulous, untested and lacking in detail.[31] Secondly, the numerous issues surrounding the enforcement of ethical codes and standards are in need of attention and consideration. The existence of ethical standards without a means of enforcement or monitoring is problematic. Finally, and perhaps the most critical matter explored, is the need to focus on how individuals learn "ethical

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[25] Feerick, *supra* note 13, at 458.

[26] Jamie Henikoff & Michael Moffitt, *Remodeling the Model Standards of Conduct for Mediators*, 2 HARV. NEGOT. L. REV. 87, 88–89 (1997).

[27] *See* JOSEPH B. STULBERG, MODEL STANDARDS OF CONDUCT FOR MEDIATORS REPORTER'S NOTES 1 (2005), *available at* http://moritzlaw.osu.edu/dr/msoc/pdf/reportersnotes-april102005final.pdf (noting that the original standards have served as a basis of many other codes throughout the United States). In addition, the Model Standards have also been considered in other countries. For example, I was asked to review and construct a Code of Ethics for Argentinean mediators through the Chamber of Commerce and I found that the Model Standards had been translated verbatim for use.

[28] The draft was approved by the American Bar Association's governing body, the House of Delegates, on August 9, 2005, the Association of Conflict Resolution on August 22, and the American Arbitration Association on September 9. Press Release, ABA Sec. of Disp. Resol., Model Standards of Conduct for Mediators Approved by ABA (Sept. 2005) (on file with author).

[29] For the final draft as well as previous drafts and reporter's notes, see http://moritzlaw.osu.edu/dr/msoc/. The ABA Section of Dispute Resolution provides a chart comparing the 1994 and 2005 versions. ABA SEC. OF DISP. RESOL., COMPARISON DOCUMENT FOR THE MODEL STANDARDS OF CONDUCT FOR MEDIATORS, *available at* http://www.abanet.org/dispute/news/comparison1994vaugust2005.pdf (last visited Oct. 31, 2005).

[30] STULBERG, *supra* note 27.

[31] *See infra* notes 69–77 and accompanying text.

conduct." While enactment and enforcement are effective and necessary steps in the process toward professionalism, the profession, as well as those engaged in teaching and training mediators, have a responsibility to ensure that individuals are not only familiar with the content of such standards, but also are able to conduct themselves accordingly. Each of these idea(l)s can have considerable impact upon the professional practice of mediation.

II. SIGNIFICANT CONTENT CHALLENGES

One quite significant feature of any code of ethics is its content. In considering the provisions of ethical codes, some matters are rather generic, applicable to most professions generally,[32] while others are specific to each individual profession or practice.[33] As ethical guidelines set the parameters of acceptable conduct within a profession, it is quite possible that their content will be carefully scrutinized. Such may be the case with codes of conduct for mediators.

A. *Generally*

Certainly the content of the various ethical codes and standards of conduct for mediators[34] has been much discussed and debated.[35] While many

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[32] For example, a survey of several codes of ethics for professions ranging from journalism to engineering demonstrated that provisions such as competency and truthfulness are included with near uniformity. For a compilation of the various codes of ethics in the professions see http://www.iit.edu/departments/csep/codes (follow "The Index of Codes" hyperlink) [hereinafter *Index of Codes*] (last visited Oct. 31, 2005).

[33] For example, the Building Owners and Managers Association (BOMA) Code of Professional Ethics and Conduct includes a provision of responsibility to Real Property and Equipment. See BOMA Code of Professional Ethics and Conduct, http://ethics.iit.edu/codes/coe/BOMA-CoE.html (last visited Oct. 31, 2005).

[34] Numerous groups at the local, state, and national level have enacted mediator codes of ethics and standards of conduct. Pou, *supra* note 13, at 203. While there is some differentiation between ethical codes and standards of conduct—for example, ethics are viewed as being more concerned with moral behavior while standards of conduct refer to the way an individual professional may conduct himself in the process, see KOVACH, *supra* note 2, at 395—it is quite commonplace within the profession to use these terms as interchangeable.

[35] As the co-reporter for the initial Joint Code, I participated in numerous meetings and telephone conferences consisting of detailed discussions of each provision over more than two years. No doubt each organization, when embarking upon drafting such documents, engages in such discussions and debate.

core issues such as neutrality or impartiality,[36] conflicts of interest, and confidentiality are included in many, if not most mediator codes,[37] other elements are practice specific.[38] Yet consistently absent in most codes is any mention of honesty or truthfulness.[39] In part, this may be due to the fact that discussions of mediator dishonestly or deception were virtually nonexistent. For the most part, it did not occur to drafters that truthfulness was a concern regarding a mediator's conduct.

Another influencing factor in the creation of mediator standards was the legal profession. Several of the early codes of ethics for mediators look similar to ethical provisions for lawyers.[40] Yet much of what mediators do is considerably different from lawyering, and is in fact, contrary to an adversarial approach.[41] Mediation encompasses a great deal of variation in terms of necessary skills, knowledge and abilities. Mediation has often been termed interdisciplinary, a reflection of the fact that it is not one or two types of training and education which inform the field, but rather a diversity of knowledge and skills that provides the foundation for the mediator's work.[42]

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[36] Most of the time, these terms are used interchangeably, although at least one organization noted that differences exist. *See* KOVACH, *supra* note 2, at 212.

[37] For a comparison of several codes of ethics for mediators, see *id.* at 534–60.

[38] For example, the Americans with Disabilities Act (ADA) Mediation Guidelines include a provision establishing an affirmative duty to verify the participant's capacity for engaging in the process and decision-making. *See* Judy Cohen, *ADA Guidelines Raise the Ethics Bar*, DISP. RESOL. MAG., Fall 2004, at 3, 3.

[39] KOVACH, *supra* note 2, at 535–60.

[40] Likely the most notable are the Standards in Florida. *See generally* Robert B. Moberly, *Ethical Standards for Court-Appointed Mediators and Florida's Mandatory Mediation Experiment,* 21 FLA. ST. U. L. REV. 701 (1994) (outlining both the standards themselves, as well as the enforcement procedure which appears to have remnants of bar work). Often in many jurisdictions a committee of the bar association, namely the ADR committee or section, took the initiative to begin to consider and draft ethical standards for mediators. Numerous lawyers worked on these efforts, and, as a result, the form and even substance in many instances appears remarkably similar to some provisions of professional responsibility codes for lawyers. While most of the drafters were familiar with legal ethics, few examined the ethics of other professionals, such as psychologists, engineers, architects, and certified public accountants.

[41] Not all have subscribed to this view of mediation. *See, e.g.*, Stempel, *supra* note 19 (explaining a view which continues to mix mediation with the adversarial process). *But cf*, Love & Kovach, *supra* note 19 (contending that each ADR process is distinct with different goals and objectives, and highlighting the importance of keeping these distinctions in place).

[42] *See* Christopher Honeyman, *On Evaluating Mediators*, 6 NEGOTIATION J. 23, 26–32 (1990). For a discussion of Honeyman's Test Design Project, see http://www.convenor.com/madison/tdesign.htm (last visited Oct. 31, 2005). For another

It would seem that much could be learned and gained from considering the ethical parameters set forth by a variety of other professions. With a broad survey providing greater knowledge of the ethical provisions of other professions, mediators' codes would be better informed and more interdisciplinary in nature.

In addition, mediation is a relatively new and innovative profession. As a new profession evolves, reliance on conventional thinking and past experience should be supplemented by unique considerations and a fresh view of its work. With a re-examination of the foundation of ethics generally, followed by the exploration of other professional ethics, more thorough and comprehensive provisions may result for the specialized field of mediation. As mediation provides a new paradigm for problem solving, which moves away from the more traditional view of right and wrong,[43] so too should ways of addressing professional conduct be distinctive.

B. *An Ethic of Honesty*

Although it is often assumed in most professional settings that individuals will be honest, such is not always the case. As a result, many professions have included a standard of truthfulness and honesty in their codes of ethics or standards of conduct.[44]

1. *Controversial Conduct Necessitates Change*

While some may wonder whether mediators are really dishonest, concerns have been voiced about mediators' tendency to move toward more deceptive and manipulative conduct in order to achieve agreements. [45] In

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view, see Christopher Honeyman, *Something More than Skill: What are Parties really Seeking in a Mediator?*, 23 ALTERNATIVES TO HIGH COST LITIG. 63 (2005).

[43] While mediation is used in conjunction with the more traditional, adversarial paradigm in the settlement of lawsuits, many hold that much of the benefits and advantages of mediation arise from the ability to solve problems in a more collaborative manner, one which no longer relies on the determination of right and wrong. *See* Kimberlee K. Kovach & Lela P. Love, *Mapping Mediation: The Risks of Riskin's Grid*, 3 HARV. NEGOT. L. REV. 71, 98 (1998).

[44] *See Index of Codes*, *supra* note 32.

[45] James R. Coben, *Mediation's Dirty Little Secret: Straight Talk About Mediator Manipulation and Deception*, ALTERNATIVE DISP. RESOL. IN EMP., Winter 2004, at 4, 6 [hereinafter *Secret*]; Bruce Meyerson, *Telling the Truth in Mediation: Mediator Owed a Duty of Candor*, DISP. RESOL. MAG., Winter 1997, at 17, 18; James R. Coben, *Gollum, Meet Smeagol: A Schizophrenic Rumination on Mediator Values Beyond Self-Determination and Neutrality*, 5 CARDOZO ONLINE J. CONFLICT RESOL. 65, 73–77 (2004) [hereinafter *Gollum*].

many cases, one's view may depend, not surprisingly, upon the definition of terms such as deception and truthfulness. But even with the narrowest definition, it can be said that some mediator conduct is considered dishonest or deceptive.

Examples of what can be termed, at a minimum, "controversial" mediator conduct will illuminate these concerns. A few years ago I attended a program where a speaker was discussing and debriefing a simulation of a divorce mediation. A number of issues had been presented during the course of the role-play, including matters such as child support, visitation schedules, car and house ownership, liabilities, and the ownership of a vacation condominium. During a series of caucuses, these issues were discussed and offers exchanged. Thereafter, during the discussion or de-briefing portion of the program, the speaker analyzed the mediator's actions,[46] as well as suggested additional options or approaches to the process. At one point, when discussing the fact that the husband had authorized the mediator to convey an offer of settlement to the wife which included the condominium, the speaker mentioned that the better mediator strategy would be to not disclose that element of the offer, but rather "keep it in your back pocket" for use at a later time.[47] In fact, he proudly noted that this was termed a "hold back." It should also be made clear that the way this strategy was presented was not as a method of assisting the party in decision-making about the timing of the offer.[48] Rather, the speaker outlined how the mediator could manipulate the process to assure an agreement is reached, by at various times holding back proposals for use later in the process. How and when to convey information, the speaker pointed out, should be the unilateral decision of the mediator. Many of the participants seemed to accept this as part of mediator strategy.

Others have also wondered about mediator conduct and the possibility that mediators may be deceptive in their work, either deliberatively or inadvertently. For example, several years ago mediation professor Jim Stark made a presentation that considered a variety of mediator behaviors that

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[46] Demonstration: Moving the Parties to Settlement, Family Law Mediation Training Seminar (October 7–9, 1999).

[47] *Id.*

[48] Most mediators, myself included, believe that assisting the parties in negotiation is part of their role. Such assistance encompasses a number of aspects of negotiation, including both the formulation and timing of offers and demands. Taking an active, and often outcome determinative role without the party's knowledge or consent, however, goes, in the opinion of most mediators, beyond the mediator's role.

could be considered as "deceptive." [49] It was noted emphatically that such term should not be assumed to be pejorative.[50]

The suggested scenarios included cases when a mediator failed to correct a mistaken assumption about the mediator's qualifications or an impending court date. Also mentioned were exaggerations about the progress being made during the mediation session. Of course, it could be argued in such instances that the mediator was not acting in an affirmatively dishonest way, as there is likely no affirmative duty to correct a mistaken impression. Perhaps more problematic are those situations where the mediator actively and deliberatively misleads or misinforms the participants. One example is where it appears, and would to any objective observer, that the potential for reaching an agreement is hopeless, yet the mediator makes a statement such as "we are making such great progress here."

In addition, situations exist where a mediator is deliberately proactive in a misleading or deceptive manner in the communication about the actual offer or proposal. These situations may be more troublesome, at least for some.[51] For instance, Party A tells that mediator that what is most important in the resolution of the matter is that he receive an apology from Party B. The mediator then learns from Party B that there is absolutely no way that she will offer anything which even remotely resembles an apology. Yet, the mediator, when meeting with Party A, goes into great detail about how sorry Party B is.[52]

Although many mediators, at least publicly, say that they would not in any way be dishonest or deceptive, others, at least tentatively, find arguments for why some mediators would, or at least should, do so.[53] Some have justified or rationalized such conduct generally, as "part of the job," noting that mediators should do everything possible to reach an agreement and get

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[49] *See* James Stark & David Batson, Exploring the Limits of Permissible Mediator Deception (September 23, 1999) (unpublished manuscript, on file with the author). This manuscript was presented at SPIDR (now ACR) Annual Conference in Baltimore in 1999.

[50] *Id.* at 1.

[51] As noted, some mediators assert that it is necessary to always accurately reflect the communication and information exchanged. *See supra* Part II.

[52] Stark & Batson, *supra* note 49, at 3.

[53] *See* Robert D. Benjamin, *The Constructive Uses of Deception: Skills, Strategies, and Techniques of the Folkloric Trickster Figure and Their Application by Mediators*, 13 MEDIATION Q. 3, 15–16 (1995).

the deal done.[54] These types of assertions view the mediator's primary, if not exclusive, task and role as achieving an agreement or a resolution.[55]

Participant conduct has also served as validation for such conduct in two primary ways. One is that the participants themselves are deceptive and the mediator must be so as well. Another variation on the same theme is that since everyone else is lying as part of the 'adversarial game'[56] mediators, must also be deceptive in order to play.[57] Consequently, in some arenas, it is not only acceptable practice for mediators to be misleading, but they are urged to do so.[58] Alternatively, there are those in the mediation community who have called for changes in the adversarial game, particularly when it is moved to the mediation playing field. By revising the truthfulness standard for lawyers,[59] the rules and conditions of the game can be changed. While change in the ABA Standards has not yet been successful, some progress has been made.[60] Perhaps with the recognition that innovative approaches in

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[54] *Id.*

[55] This view can be contrasted with another, very different notion of the mediator's role: that of assisting parties in empowerment and recognition. *See generally* ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, THE PROMISE OF MEDIATION: RESPONDING TO CONFLICT THROUGH EMPOWERMENT AND RECOGNITION (1994).

[56] Yet changes in terms of mediation and problem solving have been urged. *See* James J. Alfini, *Settlement Ethics and Lawyering in ADR Proceedings: A Proposal to Revise Rule 4.1,* 19 N. ILL. U. L. REV. 255, 256 (1999); Kimberlee K. Kovach, *Representing Clients in Mediation: Ethical, Legal and Practical Concerns*, 23 THE ADVOC. 14 (2003) [hereinafter *Representing*]; Kimberlee K. Kovach, *New Wine Requires New Wineskins: Transforming Lawyer Ethics for Effective Representation in a Non-Adversarial Approach to Problem Solving: Mediation*, 28 FORDHAM URB. L.J. 935, 935–59 (2001) [hereinafter *New Wine*]; Carrie Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving,* 31 UCLA L. REV. 754, 763–64, 801–17 (1984).

[57] *See* John W. Cooley, *Defining the Ethical Limits of Acceptable Deception in Mediation*, 4 PEPP. DISP. RESOL. L.J. 263, 264–71 (2004) [hereinafter *Defining*]; John W. Cooley, *Mediation Magic: Its Use and Abuse*, 29 LOY. U. CHI. L.J. 1, 4 (1997) [hereinafter *Magic*] (noting that mediators use a number of magician like and deceptive actions throughout the process).

[58] *Magic*, *supra* note 57, at 4–5. *See generally* Robert D. Benjamin, *Managing the Natural Energy of Conflict: Mediators, Tricksters, and the Constructive Uses of Deception*, *in* BRINGING PEACH INTO THE ROOM 79 (Daniel Bowling & David Hoffman eds., 2003).

[59] *See* Alfini, *supra* note 56, at 269–71; *New Wine*, *supra* note 56, at 961–76; Kimberlee K. Kovach, *Lawyer Ethics Must Keep Pace with Practice: Plurality in Lawyering Roles Demands Diverse and Innovative Ethical Standards*, 39 IDAHO L. REV. 399, 420–21 (2003) [hereinafter *Lawyer Ethics*].

[60] ETHICAL GUIDELINES FOR SETTLEMENT NEGOTIATIONS (ABA Sec. of Litig. 2002), *available at* http://www.abanet.org/litigation/ethics/settlementnegotiations.pdf.

negotiation and mediation are beneficial and often achieve enhanced results, lawyers will no longer rely solely on the adversarial method in settlement discussions. When lawyers and others realize and appreciate that a more expansive approach to negotiation encompassing a collaborative style can lead to positive and sustainable outcomes, conduct may change. By not engaging in deceptive tactics, mediators can set the example and lead the way in the collaborative use of negotiation, problem solving and dispute resolution. Empirical evidence demonstrates that the deceptive nature of the adversarial negotiation that is contemplated in the lawyer standards is beginning to give way to a more problem solving approach.[61] Since most mediators embrace and promote such methods, it would seem logical and sensible that mediators assist with this transition.

Another stated justification for mediator deception is that it is necessary as a means to counteract reactive devaluation.[62] When mediators fear that a party may decline to accept an offer of settlement if the "other side" has proposed it or if the individual has not engaged in sufficient exchanges, mediators can 'revise' the offer so that it is more palatable to the party. By holding back offers and framing them in more acceptable terms or in assuming ownership for them, mediators try to increase the likelihood that such proposals are acceptable to the party. While some reframing of issues and even proposals is a common part of the mediation process,[63] the extent to which a mediator uses reframing can have a significant impact upon the outcome.[64] While some assistance through reframing is acceptable, when the mediator's statements reach a level of deceit, the line into the realm of unacceptable mediator conduct has been crossed.[65]

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[61] *See generally* Andrea Kupfer Schneider, *Shattering Negotiation Myths: Empirical Evidence on the Effectiveness of Negotiation Style*, 7 HARV. NEGOT. L. REV. 143 (2002).

[62] Reactive devaluation can be described as a phenomenon that individuals may reject an offer of resolution that is something they might otherwise accept but for the fact that someone on the other side of the negotiation or mediation proposed it. *See* Robert H. Mnookin, *Why Negotiations Fail: An Exploration of Barriers to the Resolution of Conflict*, 8 OHIO ST. J. ON DISP. RESOL. 235, 246–47 (1993); RUSSELL KOROBKIN, NEGOTIATION THEORY AND STRATEGY 102–08 (2002).

[63] The subject of reframing is found in most of the training materials for mediators. *See* KOVACH, *supra* note 2, at 180–81; DWIGHT GOLANN, MEDIATING LEGAL DISPUTES 71, 171–72 (1996).

[64] *See* Jacqueline Nolan-Haley, *Informed Consent in Mediation: A Guiding Principle for Truly Educated Decisionmaking*, 74 NOTRE DAME L. REV. 775, 805–06 (1999) (noting that how a mediator manages the information during a caucus could influence the result of the mediation thereby undermining and deserting the notion of party self-determination).

[65] *Id.*; *cf*, Benjamin, *supra* note 53, at 15–16.

2. *Current Standards*

Many, if not most of the existing standards of conduct and codes of ethics for mediators do not include a reference to honesty or truthfulness. Likely the concept of deception or manipulation by mediators was not something that one readily thought of when considering standards of conduct. Yet mediator deception has recently become more prevalent in the literature[66] as well as the subject of conferences and educational programs.[67]

The revised Joint Code[68] includes a provision that states, "a mediator should[69] promote honesty and candor between and among all participants, and a mediator shall not knowingly misrepresent any material fact or circumstance in the course of a mediation."[70]

While certainly this provision is a step in the right direction, it must be more explicit. While the drafters mention honesty they have not gone far enough. In particular, the rules need to address two concerns. First, the term "promote" is vague. Just what is meant by such a term is unclear. How do mediators 'promote' and what is the intended result? It could be argued that to promote is merely to suggest that parties be forthcoming during the mediation. Under this definition, most mediators "promote." Alternatively, this directive can be interpreted to say that mediators must insist on candor and honesty? Such an approach will conflict with self-determination. For example, if no good faith requirement is in place,[71] then it can be argued

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[66] *Secret*, *supra* note 45; *Gollum*, *supra* note 45. *See generally* Stark & Batson, *supra* note 49; *Defining*, *supra* note 57.

[67] James J. Alfini et al., *Defining Coercion in Mediation: Can We Do Better Than "I Know It When I See It"?*, ABA Section of Dispute Resolution, Sixth Annual Conference, "The Golden State of ADR" Conference Los Angeles (April 14–16, 2005); Kimberlee K. Kovach, *What's Missing from Ethics—Must Mediators Be Honest?*, Workshop for the Georgia 11th Annual ADR Institute and 2004 Neutrals' Conference (November 19, 2004).

[68] *Supra* note 28.

[69] As part of the definitional introduction to the standards, a provision explicitly distinguishes between "shall" and "should" noting that shall "indicates that the mediator must follow the practice described" and "indicates that the practice described in the standard is highly desirable, but not required." MODEL STANDARDS OF CONDUCT FOR MEDIATORS, *Note on Construction* (2005), *available at* http://www.abanet.org/dispute/news/ModelStandardsofConductforMediatorsfinal05.pdf.

[70] *See id.* Standard VI (A)(4).

[71] For an in-depth discussion of good faith participation in mediation see Roger L. Carter, *Oh, Ye of Little (Good) Faith: Questions, Concerns and Commentary on Efforts to Regulate Participant Conduct in Mediation*, 2002 J. DISP. RESOL. 367; John. M. Lande, *Using Dispute System Design Methods to Promote Good-Faith Participation in Court-Connected Mediation Programs*, 50 UCLA L. REV. 69 (2002); Kimberlee K. Kovach,

parties are free to use all types of litigation tactics—including deceit.[72] In cases where the participants are lying or engaging in deceptive practices, what can a mediator do to promote honesty and candor? Does she refuse to engage in an information exchange, or alternatively terminate the session? Without greater detail concerning the recommended practice, it is nearly impossible to determine if the provision is complied with.

Even more troublesome is the term "material" when referencing the mediator's own conduct. Since the drafters did not define or explain the term, each mediator must decide on an individual basis whether some statement or action is, in fact, material. Currently numerous differences in interpretation exist which results in uncertainty.[73] Unfortunately, if an attempt to clarify the term is made by an analogy to another code that explains the term, most notably the Model Rules of Professional Conduct,[74] the result does little to promote honesty. Rather the term "material" allows[75] intentional conduct that is deceitful and dishonest.[76]

Many other professions have an obligation or standard of truthfulness and honesty as part of their ethical codes. So must mediators. At least two primary reasons support the inclusion of an unconditional, or at least a less conditional standard of truthfulness. One is the integrity of the mediation profession itself. The other is the possibility, though admittedly remote, that through a more honest and open mediation process, which is essentially facilitated negotiation, that the ethical standards in the negotiation process

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Good Faith in Mediation—Requested, Recommended, or Required? A New Ethic, 38 S. TEX. L. REV. 575 (1997).

[72] *See* Edward F. Sherman, *Court-Mandated Alternative Dispute Resolution: What Form of Participation Should be Required?*, 46 SMU L. REV. 2079, 2094 (1993) (arguing that a good faith requirement in court-annexed ADR interferes with the parties' right to choose litigation strategies).

[73] Many times at CLE programs, when discussions have focused on the commentary to Model Rule 4.1, which explains, at least in the view of the drafters, the term "material fact," much disagreement ensues regarding the practical effect of the term.

[74] MODEL RULES OF PROF'L CONDUCT R.4.1 (2002).

[75] In addition to the articles that call for changes, one state made a determined effort to delete the term "material." Ultimately, the rules were enacted as drafted in the Model Rules. Alfini, *supra* note 56, at 270–78 (citing A. Jeffry Taylor, *Work in Progress: The Vermont Rules of Professional Conduct*, 20 VT. L. REV. 901, 913 (1996)).

[76] Alfini, *supra* note 56, at 270–72; Gerald B. Wetlaufer, *The Ethics of Lying in Negotiations*, 75 IOWA L. REV. 1219, 1223–33 (1990); Geoffrey M. Peters, *The Use of Lies in Negotiation*, 48 OHIO ST. L.J. 1, 13–20 (1987); Charles B. Craver, *Negotiation Ethics: How to be Deceptive without Being Dishonest/How to be Assertive without Being Offensive*, 38 S. TEX. L. REV. 713, 713–20 (1997).

generally can be effected and changed in a way to promote more candid discussion and problem solving.[77]

3. *An Ideal Truthfulness Standard*

The first step in changing the standard is the deletion of the reference to material. In the context of the standards for lawyers, this term is used to allow great discretion. In the context of legal negotiation, Model Rule 4.1 has been used in a way to permit puffery as well as outright lies.[78] A recent study demonstrated that a great deal of variance exists in the decisions as to whether conduct is beyond ethical limits.[79]

The replacement may be something near absolute, leaving little wiggle-room.[80] While perhaps some allowance should be given for insignificant matters, or the types of statements that have been termed white lies,[81] the discretion to be less than honest in terms of the content of mediation should not be available. One suggestion can be based on a proposed rule for the change in lawyer truthfulness.[82] The wording of the proposed standard in the context of lawyer conduct can be easily adapted for mediators and would read as follows:

During the course of a mediation, a mediator shall not knowingly:

(a) make a false statement of fact or law to any participant in the process;
(b) assist the parties in reaching a resolution that is based, in whole or in part, upon incorrect or fraudulent information;
(c) fail to correct a mistake of information when such is directly relevant to the content of the mediation.

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[77] Some authors, however, urge caution in this regard. *See, e.g.*, Peter Robinson, *Contending with Wolves in Sheep's Clothing: A Cautiously Cooperative Approach to Mediation Advocacy*, 50 BAYLOR L. REV. 963, 969 (1998).

[78] Alfini *supra* note 56, at 265–268; *see also* Gary Tobias Lowenthal, *The Bar's Failure to Require Truthful Bargaining by Lawyers*, 2 GEO. J. LEGAL ETHICS 411 (1988).

[79] *Defining*, *supra* note 57, at 269 (providing the results of an informal study asking lawyers, judges, and law professors about specific conduct in the framework of negotiations). The variance in the results clearly demonstrates that, even though rules and standards are enacted and enforced, much room for interpretation remains.

[80] Knowing, however, that there is always room for some differences in interpretation.

[81] *See Defining*, *supra* note 57, at 264. Others, however, express concern that white lies are nonetheless lies and often signal the beginning of greater deception. *See, e.g.*, Stephen D. Easton, *My Last Lecture: Unsolicited Advice for Future and Current Lawyers*, 56 S.C. L. REV. 229, 249 (2004).

[82] Alfini, *supra* note 56, at 270–71.

Commentary could provide additional detail. In addition, issues arise in the application of the rule. One particular quandary surrounds the difficulty in the subjective interpretation of the terms. Methods that make the rule more objective are needed. Defining "content" of the mediation is one example. Yet, no matter what or how detailed the words are, some room for interpretation will remain. In order to provide additional guidance, notes and comments to the standard should also be enacted. In addition, once the profession begins to police itself through an established enforcement process, additional understanding of the standard will emerge.

III. IMPORTANCE OF ENFORCEMENT MECHANISMS

While aspirational standards are helpful and certainly beneficial in many ways, most other professions have means of enforcing ethical conduct.[83] If mediation is truly a new profession and subscribes to the precepts of self-regulation, as do most, if not all, professions,[84] then procedures for the enforcement of such standards must be enacted.

A. *Historical Perspectives*

Historically, no organization or entity has existed which was in a position to enforce or regulate the practice of mediation. While some suggestions have been made such as a National Ethics Board,[85] and attempts have been made in several states,[86] the fact remains that no one entity has been established. This is further complicated by the fact that a variety of programs and groups have begun to consider the issue and have set in place procedures to address ethical concerns.[87] These programs differ considerably. While some experts have advised us to embrace limbo,[88] at some point

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[83] *Index of Codes*, *supra* note 32.

[84] *See generally* Debra Lyn Bassett, *Redefining the "Public" Profession*, 36 RUTGERS L.J. 721 (2005) (discussing the meaning of "profession" and, specifically, law as a profession).

[85] *See* Jack Hanna et al., A National ADR Ethics Board: Is it Time?, Panel Discussion at the ABA Sec. of Disp. Resol. Seventh Annual Conference (April 14, 2005). A brief synopsis of the discussion is available in the program for the conference at http://www.abanet.org/dispute/concurrentsession.pdf.

[86] Pou, *supra* note 11, at 315–23 (surveying several of the methods currently in use to "assure quality").

[87] *Id.* at 346–47.

[88] Pou, *supra* note 13.

undoubtedly, the public will begin to demand that reliable methods are in place if, in fact, mediation is to be considered a profession.[89]

1. *Why Critical Now*

i. *Public Concerns*

Years ago, when discussions turned to mediator quality control, the matter of ethics was considered a significant part of regulation. The most common stated justification in support of regulation was the protection of the public,[90] which is a common basis for the establishment of ethical standards in general.[91] Those opposed to any means of quality control would often assert that no need existed, as no complaints against mediators had been lodged.[92] Of course this premise is problematic, as no process or organization existed which could administer such complaints. As a result, there has been little ability to assess problems or concerns.

Knowledge of dissatisfaction with mediator conduct has, however, been reported on an informal basis. For example, when I served as Co-Chair of the State Bar of Texas ADR Section,[93] I received numerous phone calls from individuals who wanted to voice a complaint about their experience in mediation. As most of the cases involved court-annexed mediation, they sometimes called the state bar which then referred them to the current ADR section chair. The process continues today, although there has been no effort to quantify these complaints. While a few complaints could be attributed to dissatisfaction with the outcome or misunderstanding of the process, others explained the conduct of the mediator (as they perceived it) that in some

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[89] Doubt has been voiced on this issue, noting that by some definitions mediation would not qualify as a profession. Craig McEwen, *Giving Meaning to Mediator Professionalism*, DISP. RESOL. MAG., Spring 2005, at 3, 3.

[90] This statement is based upon the author's participation in numerous meetings and conferences discussing mediator quality control. Today the need for uniformity of training and skills, professionalism concerns, and consumer selection are additional rationales for regulation. Sarah Rudolph Cole, *Mediator Certification Has the Time Come?*, DISP. RESOL. MAG., Spring 2005, at 7, 7.

[91] *See* Pou, *supra* note 13, at 208.

[92] Jay Folberg, *Certification of Mediators in California: An Introduction,* 30 U.S.F. L. REV. 609, 609 (1996); *see also* Stephanie A. Henning, Note, *A Framework for Developing Mediator Certification Programs*, 4 HARV. NEGOT. L. REV. 189, 191–95 (1999) (discussing additional reasons in opposition to mediator regulation); KOVACH, *supra* note 2, at 430–31.

[93] In 1991–1992, the author served as co-chair of the State Bar of Texas Committee on Alternative Dispute Resolution, which in 1992 became a section of the State Bar.

cases was clearly outside the limits of acceptable mediator conduct.[94] Each time a party voices a complaint about a mediator and that complaint is not resolved, the party sees that the "profession" is not active in self-regulation. In addition, lingering dissatisfaction with the process does little to promote the use of mediation.

ii. *Court Holdings*

As mediation use has increased, not surprisingly so too has the case law concerning mediation practice.[95] In these cases, courts have begun to address a wide variety of facets of mediation practice ranging from confidentiality issues[96] to participant participation matters[97] to enforcement of mediated agreements.[98] A few cases have also touched upon ethical matters,[99]

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[94] One example is a mediator who told the parties that if they refused to agree to the offer of settlement, the mediator was going to talk with the Judge in the case, (noted to be a good friend) and tell him how to rule on a pending motion, that being against the reluctant party.

[95] *See* James J. Alfini & Catherine G. McCabe, *Mediating in the Shadow of the Courts: A Survey of the Emerging Case Law*, 54 ARK. L. REV. 171, 171–74 (2001); James J. Alfini, *Mediation's Coming of (Legal) Age*, 22 N. ILL. U. L. REV. 153, 155 (2002); Fran L. Tetunic, *Florida Mediation Case Law: Two Decades of Maturation*, 28 NOVA L. REV. 87, 89–91 (2003). Additionally, the inclusion of case law increased the size of mediation textbooks. The author's first textbook, published in 1994, had 287 pages. The 2004 edition has 588 pages. KOVACH, *supra* note 2. This increase is primarily due to the inclusion of case law. Moreover, mediation case law updates are more common at Continuing Legal Education programs. *See* http://www.legalspan.com/ICLEF/catalog.asp?UGUID=&CategoryID=22000071035612 0132338&ItemID=20050815-213115-140452 (last visited Oct. 31, 2005); http://www.floridamediationgroup.com/seminar/cle_mediation.php (last visited Oct. 31, 2005).

[96] *See* Olam v. Cong. Mortgage Co., 68 F. Supp. 2d 1110, 1133, 1139 (N.D. Cal. 1999); RDM Sports Group, Inc. v. Equitex, Inc. (*In re* RDM Sports Group, Inc.), 277 B.R. 415, 437 (Bankr. N.D. Ga. 2002); Rojas v. Superior Court, 93 P. 3d 260, 265–71 (Cal. 2004).

[97] *See In re* Atlantic Pipe Corp., 304 F.3d 135, 141–42 (1st Cir. 2002); Nick v. Morgan's Foods, Inc., 270 F.3d 590, 594–95 (8th Cir. 2001); Smith v. Archer, 812 N.E.2d 218, 220 (Ind. Ct. App. 2004); Tex. Parks & Wildlife Dep't v. Davis, 988 S.W.2d 370, 375–76 (Tex. App. 1999); Texas Dep't of Transp. v. Pirtle, 977 S.W.2d 657, 658 (Tex. App. 1998).

[98] *Olam*, 68 F. Supp. 2d at 1125; Allen v. Leal, 27 F. Supp. 2d 945, 947 (S.D. Tex. 1998); Silkey v. Investors Diversified Servs., Inc., 690 N.E.2d 329, 332–33 (Ind. Ct. App. 1997); Chappell v. Roth, 548 S.E.2d 499, 500 (N.C. 2001).

[99] Admittedly, the subject of ethics encompasses a large number of issues and is further complicated by the intersection of the legal profession, the courts, and mediation.

primarily conflicts of interest.[100] Courts are clearly in a position to consider, determine, and rule on the legal parameters of mediation with regard to pending litigation matters.[101] On the other hand, they are perhaps not as knowledgeable with regard to mediator ethics.[102] Yet, if the profession itself fails to engage in a process to enforce those ethical standards that have been enacted, then it is much more likely that others will do so. Courts may assume this role, with little real understanding about the intricacies of the mediation process.[103] Matters of ethics must be considered and debated by those with familiarity and practical experience in the subject matter. This is especially important in the field of mediation, which is still relatively new and evolving. If, however, a void exists, that is no organization is in place, then the only entity with authority to take some action is the court—at least in court-annexed cases. And while in some instances court supervision over a mediator's conduct may be necessary, the courts should not serve as the primary enforcement mechanism for mediator codes of conduct. Most other professions do not rely on courts or other outside entities, but rather sponsor the enforcement procedure within the professional organization.

The involvement of courts in mediator ethics is troublesome for at least three reasons. First, most judges have no real understanding of the mediation process,[104] at least not to the degree necessary for the analysis and decision-

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[100] Fields-D'Arpino v. Rest. Assocs., Inc., 39 F. Supp 2d. 412, 414 (S.D.N.Y. 1999); McKenzie Constr. v. St. Croix Storage Corp., 961 F. Supp. 857, 858 (D. V.I. 1997); Poly Software Int'l, Inc. v. Su, 880 F. Supp. 1487, 1490 (D. Utah 1995).

[101] Some concern has been voiced about the way courts frame and address these issues, resulting in a wide diversity in holdings.

[102] In Texas, the Supreme Court created an Advisory Committee on Court-Annexed Mediations to make recommendations to the court on mediation oversight. *Supreme Court Approves Ethical Guidelines for Mediators*, 68 TEX. B.J. 856, 856 (2005). The Advisory Committee reported that there is "no consensus within the mediation profession in Texas as to whether the Supreme Court should become involved in credentialing and/or registration of mediators." *Id.* The Committee did recommend that the Supreme Court promulgate ethical rules. *Id.* The Court accepted that recommendation and promulgated the Ethical Guidelines for Mediators. *Id.* at 856–58.

[103] Admittedly, many judges are familiar with the term mediation and often refer cases to the process. In most cases, however, they are neither trained in nor have they contemplated the process to the same extent as most practicing mediators and mediation scholars. *See* Roland Beaudoin, *To Change is Simple, To Improve is Difficult (A Cautionary Note)*, 17 Me. B.J. 188, 190 (2002) ("Judges are not trained or qualified to perform the work of psychologists, substance abuse counselors, group facilitators, or mediators, yet they are increasingly thrust into those roles.").

[104] Of course, some judges are quite knowledgeable about mediation. For example, some served as mediators prior to taking the bench. Examples include Federal Judge Nancy Atlas (Southern District of Texas, Houston Division) and Texas State Judge John

making in matters which are somewhat sensitive and necessitate a comprehensive analysis. Often experienced mediators themselves disagree on ethical issues. To expect that a judge with no experiential understanding of the process make ethical decisions is problematic. Secondly, the jurisdiction of courts is quite limited as they may only regulate law practice. In other words, courts can likely exercise jurisdiction over those mediators who mediate pending lawsuits and those mediators who are lawyers, provided those lawyers serving in a mediator role are still considered officers of the court.[105] But in matters that arise in completely private mediation programs or cases, courts lack the authority to take action. This approach then produces a two-tiered enforcement procedure. Although some see this lack of uniformity as plausible, if not advantageous,[106] it fails to provide clear or easily understood procedures for the general public.

Finally, in those instances where courts do assume a role in the regulation of mediators, the process and outcomes are likely to be derivative of, and therefore very similar to, the adversarial paradigm. For example, in Florida, where, for many years, the Supreme Court has regulated mediation practice in the courts,[107] the enforcement procedure is adversarial and hearing-like. While an adjudicatory process is helpful in making enforcement clear, mediators may want to consider a different process—one more similar to the work they do and are proponents of—a more facilitative approach.

iii. *A Critical Feature of Professionalism*

Mediators are concerned with professionalism on at least two levels. The first is the need for recognition of their work as that of a professional with adequate compensation.[108] The other involves identification by the public of

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Cosselli. Others, such as Magistrate Judge Wayne Brazil, have been involved with the study and promotion of mediation for a number of years.

[105] This is questionable, however, as many commentators contend that mediation is not the practice of law, including the American Bar Association's Section of Dispute Resolution, which has passed a resolution clearly stating that mediation is *not* the practice of law. ABA Sec. of Disp. Resol., Resolution on Mediation and the Unauthorized Practice of Law (Feb. 2, 2002), *available at* http://www.abanet.org/dispute/resolution2002.pdf.

[106] Pou, *supra* note 13, at 201.

[107] *See* Florida State Courts, Alternative Dispute Resolution, http://www.flcourts.org/gen_public/adr/index.shtml (last visited Oct. 31, 2005).

[108] *See* Jeff Kichaven, When It Comes to Mediators, You Get What You Pay For (June 2004), http://www.irmi.com/Expert/Articles/2004/Kichaven06.aspx. Difficulties have arisen when mediators are expected to provide services at no cost while others are fully compensated for their time. *Id.*

the new profession of mediation[109] and respect for its work. As a cornerstone of every profession, self-regulation should be apparent in the field of mediation as well. Enforcement is necessary not only to police or monitor mediators but also as a means to inform and assure the general public that self-regulation is in place. Different methods of self-regulation exist, with the most common being a procedure where complaints are voiced to an independent body or organization.[110] Should the mediation field adopt this approach, a number of procedural or structural issues must be addressed and set into place.

2. *Structural Issues*

Enforcement consists of a number of elements including matters such as how complaints are lodged, the process or procedure used to resolve them, and potential consequences imposed in the event that mediators are found to be in violation of such standards. Few entities are in place to take on such a role, although at least two states have a process in place, primarily through their respective high courts.[111] This approach, however, cannot regulate all mediators. If, at some point, an entity is established which governs all mediators who hold themselves out to the public,[112] then the organization must create a methodology for addressing complaints.

i. *Methods of Lodging Complaints*

The first step in the process consists of a method for voicing or filing a complaint. Professions that are self-regulating, such as law, medicine, accounting and engineering have in place internal enforcement procedures to address alleged violations of ethical provisions. Those who are obligated to comply with a code must be aware not only of its actual contents and provisions, but also the consequences of failing to comply with them. In the event that violations occur, procedures are in place to investigate a report or grievance, as well as determine appropriate consequences.

Several complications arise in establishing a system for addressing complaints about mediators. The most critical is the collision of the need and

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[109] The relationship between enforcing ethics and professionalism is a discussion item within the legal profession.

[110] *See* McEwen, *supra* note 89, at 4–5. Other means of professionalism, namely that of collegial control, have been urged for mediators. *Id. passim.*

[111] The states to which I refer are Florida and Virginia. Pou, *supra* note 11, at 320–22.

[112] I distinguish those who hold themselves out to the public and charge a fee for services from those who mediate as volunteers.

expectation of confidentiality in the process[113] and the ability to explore the complaint. In order to pursue a concern or complaint, and determine the genuineness of the allegations, confidentiality must be lifted. While this issue is complex, other professions have, no doubt met such a challenge. Yet a variance arises in mediation that is not present in other professional relationships—the presence of at least two parties as well as the professional. In all other professions, the relationship exists between the complainant, the client or patient, and the professional. In these instances, a complaint serves as an essential waiver of that confidentiality. In mediation, however, when one party initiates a complaint, it may in effect be a waiver of confidentiality. With regard to the other party, however, the matter is more nebulous. While the Uniform Mediation Act, (UMA) seems to provide an all-inclusive, automatic exception to confidentiality,[114] in other instances, the complainant may need to secure a waiver. In Texas, a voluntary organization, the Texas Mediator Credentialing Association (TMCA),[115] enacted a process that allows individuals to file a grievance form with a Grievance Committee.[116] The procedure also requires the complainant to send to the committee the waivers of confidentiality from the participants.[117] Yet if the other party remains in a dispute with the first, acquiring the necessary waiver could prove difficult. Balancing confidentiality with the need for information to explore or investigate a complaint is not an easy task, and one that merits further consideration.

Finally, the public needs to know that a process exists. Methods to inform the public of the existence of a disciplinary or enforcement mechanism are needed. For the most part, the general public remains unaware of the mediation profession or practice, and in those instances of

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[113] KOVACH, supra note 2, at 262–72. *See generally* Ellen E. Deason, *The Quest for Uniformity in Mediation Confidentiality: Foolish Consistency or Crucial Predictability?*, 85 MARQ. L. REV. 79 (2001) (discussing the importance of confidentiality in mediation).

[114] UNIF. MEDIATION ACT § 6 (amended 2003).

[115] See generally Texas Mediator Credentialing Association (TMCA), http://www.txmca.org/ (last visited Oct. 31, 2005).

[116] TMCA Grievance Rules and Procedures, *available at* http://www.txmca.org/procedure.htm (last visited Oct. 31, 2005) [hereinafter *TMCA Rules*]; TMCA Grievance Form, *available at* http://www.txmca.org/grievance_form.pdf (last visited Oct. 31, 2005). *See also* Summary of TMCA Grievance Complaint Process, *available at* http://www.txmca.org/summary_grievance_process.pdf (last visited Oct. 31, 2005) (providing an overview of the TMCA grievance procedures).

[117] *See TMCA Rules*, *supra* note 116, R. 2.07(B).

familiarity, the majority view mediation as merely part of the legal system.[118] Once an enforcement system is in place, providers should inform mediation participants about the procedures to file complaints. Dissemination of these professionalism efforts can also provide information and understanding about the mediation process generally.

ii. *Processing Issues*

While the procedure used in most cases to process a complaint is evidentiary and adversarial, it seems appropriate in the case of mediators to at least consider a different or alternative process. As the mediation process is alternative, should not the profession "walk the talk"[119] and put into place a more facilitative method of resolution? Historically, the means of investigating an ethics violation or complaint made against lawyers, accountants and other professionals, has been through the use of an investigatory procedure. An evidentiary hearing is conducted and findings are made. From those findings, consequences are then derived. Certainly such approaches could be utilized with regard to mediation. A variety of facets of such a process must be established with procedural rules and steps set forth. Administrators need to also determine other related matters, such as the degree of evidentiary restrictions (for example, in compliance with rules of evidence or a more relaxed procedure)[120] and how testimony will be taken (informal or formal). Another important factor involves the decision makers. The background, training, and experience of those who are making determinations in such proceedings are critical, in light of their impact on the process. One suggestion in this regard includes a peer review process where other mediators serve in a decision-making role.[121]

Another option worthy of consideration, at least as a first step, is a facilitative approach, essentially utilizing mediation. Some believe that the complaint process should begin informally. In Florida, for instance, there is an opportunity for an informal meeting with the complainant, the mediator, and

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[118] Linda L. Golden & Kimberlee K. Kovach, Public Perception of Mediation: Truth or Consequences (unpublished manuscript (in progress), on file with the author) (summarizing a study conducted to ascertain public perception of mediation).

[119] For an examination of the use of mediation by mediators, see Kimberlee K. Kovach, *Mediation for Mediators? If You Talk the Talk, You'd Better Walk the Walk: An Examination of How Dispute Resolvers Resolve Disputes,* 11 OHIO ST. J. ON DISP. RESOL. 403, 418–20 (1996).

[120] For example, in Florida in the prosecution of a grievance, the rules of evidence apply, but they are liberally construed. Sharon Press, *Florida Provides Forum for Grievances Against Mediators*, DISP. RESOL. MAG., Spring 2001, at 8, 9.

[121] Pou, *supra* note 11, at 347.

the complaint committee.[122] A more facilitative method for processing complaints or concerns is particularly suitable where it appears that the complaint may be the result of a misunderstanding or confusion about the process. In a more adversarial system, if it is initially determined that the complainant is merely confused about an issue, the complaint is often merely dismissed. This method fails to provide the individual a real explanation or understanding about the events that occurred. On the other hand, in the case of an initial mediation or facilitated conversation, concerns can be directly addressed, allowing for a more detailed exploration of underlying misunderstandings. This approach can simultaneously serve an educational function as well.

iii. *Options for Outcomes*

A final step in an enforcement procedure involves the consequences should a determination be made that a mediator's conduct was unethical or in violation of established standards. A number of options exist, ranging from a reprimand to suspension from practice to more alternative measures, such as remedial education or training. In the ethical provisions of many professions, suggested sanctions are provided. The rationale is that, with the knowledge of potentially negative consequences, individuals will, at a minimum, conduct themselves ethically to avoid penalty. Some mediator standards provide consequences, as well.[123] In Florida, for example, the disciplinary process of an adversary hearing is used, and the decision is made through a complaint committee governed by a Mediator Qualifications Board.[124] The options for outcome, which are provided by court rule, include reprimands, suspensions, limitation of cases, and additional training.[125] While it has been noted that very few mediators have been suspended,[126] such an option remains available. Florida's scheme also provides a method for reinstatement.[127]

In many instances, as an alternative to sanctions or even perhaps in combination with a sanction, a remedial approach can be beneficial. This provides a focus on educating the mediator rather than imposing limitations

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[122] Press, *supra* note 120, at 8.

[123] Pou, *supra* note 11, at 347.

[124] In re Amendments to the Fla. Rules for Certified & Court-Appointed Mediators, 762 So. 2d 441, 466–67 (Fla. 2000) [hereinafter *In re Amendments*] (adopting Rule 10.730 of the Florida Rules for Certified and Court-Appointed Mediators).

[125] *Id.* at 472 (adopting Rule 10.830(a)).

[126] Pou, *supra* note 11, at 347.

[127] *In re Amendments*, 762 So. 2d at 472 (adopting Rule 10.830(g)).

to practice. Suppose, for example, that a more or less novice mediator becomes biased in favor of one party and an agreement cannot be reached. If the other party complains and a determination is made that the mediator violated an ethic of neutrality, one outcome may include a requirement that the mediator engage in education efforts focused on neutrality issues. Such training may include attending courses or workshops, adopting a mentor, shadowing an experienced mediator, or engaging in co-mediation for a period of time. Considering the rapid change in the mediation field, methods that emphasize additional educational opportunities are not only appropriate, but also quite valuable in the promotion of quality mediation.

While the importance of enforcement is clear, ethical rules or standards also play a very important educational function. Because individuals must be aware of the rules, it is imperative that they learn them. Yet little focus has been placed upon just how one teaches ethical concepts and even less on how ethical conduct is learned. A focus on education is not only important when an individual is initially trained, but also as part of potential consequences should violations be found. As a result, teaching and learning are critical at all levels of ethical development.

IV. TEACHING AND LEARNING ETHICAL CONDUCT

While content and enforcement are quite important, probably the most significant aspect assuring ethical conduct is its teaching and learning. In most professions where ethical standards are established, a parallel educational program exists. Even if no specific enforcement mechanism is in place, there remains a need for individuals to be familiar with those standards that govern their professional conduct. While some of the provisions may be routine, in that they are more general or basic principles of decency,[128] in other instances profession-specific guidelines for conduct must be learned.

While extensive examination of those ethical issues mediators face in practice has taken place on various levels,[129] the underlying foundation and philosophy of "ethics" appear to have received little attention from mediators. Initial questions include what it means to be ethical, whether ethics can be taught, or alternatively if ethical conduct is based upon each individual's belief system and moral compass.

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[128] Such is the tenet often advanced by mediators to "Do No Harm." Pou, *supra* note 13, at 207.

[129] *See generally* Robert A. Baruch Bush, *A Study of Ethical Dilemmas and Policy Implications,* 1994 J. DISP. RESOL. 1 (providing an in depth exploration of the ethical dilemmas of mediators and outlining the primary issues that have now formed the bases of the standards of conduct).

A. *Is Ethical Behavior "Teachable"?*

Many mediators, as other professionals, see ethics as almost a matter of common sense, yet such is not always the case, as a sufficient number of situations that give cause for concern have been reported. In some situations, mediators have reportedly engaged in conduct that would be considered unethical by most of the profession. The conduct undoubtedly violated a provision of numerous written codes, yet in most cases no action against the mediator was taken.[130] Some ethics experts, from legal educators to philosophers, have noted that ethical behavior or conduct cannot be learned through an established set of principles.[131] Rather, ethical behavior or conduct must be based on intrinsic moral principles "that transcend the existing norms or rules."[132] In this view, ethics is a result of more general moral ideals, shareable by all individuals in all facets of living.[133] Although the legal profession has rather elaborate enforceable ethical standards, little attention is paid to how such ethical principles are taught.[134] Legal educators

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[130] *See, e.g.*, Allen v. Leal, 27 F. Supp. 2d 945, 948 (S.D. Tex. 1998) (disapproving of the mediator's "bullying" tactics without taking any action against the mediator). While a few similar cases such as this have been reported, the focal point of the opinions has been on setting aside the mediated agreement. It appears that nothing was done with regard to the mediators' conduct.

[131] *See* Steven Hartwell, *Promoting Moral Development Through Experiential Teaching*, 1 CLINICAL L. REV. 505, 505 (1995).

[132] Steven Hartwell, *Moral Growth or Moral Angst? A Clinical Approach*, 11 CLINICAL L. REV. 115, 118 (2004).

[133] *Id.*

[134] *See* Roger C. Cramton & Susan P. Koniak, *Rule, Story, and Commitment in the Teaching of Legal Ethics*, 38 Wm. & Mary L. Rev. 145, 146 (1996) ("[L]egal ethics remains an unloved orphan of legal education."). Certainly, some legal educators have paid a great deal of attention to this matter, as evidenced by some of the literature. *See generally* Bruce A. Green, *Less is More: Teaching Legal Ethics in Context*, 39 WM. & MARY L. REV. 357 (1998) (discussing the proper content for a professional responsibility course); Thomas G. Krattenmaker, *Introduction to the Keck Forum on the Teaching of Legal Ethics*, 38 WM. & MARY L. REV. 1 (1996) (providing an introduction to a symposium on the teaching of legal ethics); David Luban & Michael Milleman, *Good Judgment: Ethics Teaching in Dark Times*, 9 GEO. J. LEGAL ETHICS 31 (1995) (examining the teaching of legal ethics in a time of "crisis" in professionalism); James E. Moliterno, *An Analysis of Ethics Teaching in Law School: Replacing Lost Benefits of an Apprentice System in an Academic Atmosphere*, 60 U. CIN. L. REV. 83 (1991) (discussing the continuing difficulty in effectively teaching legal ethics and professional responsibility); Thomas D. Morgan, *Use of the Problem Method for Teaching Legal Ethics*, 39 WM. & MARY L. REV. 409 (1998). Nevertheless, I maintain that this topic is the focus of a minority of legal educators.

have argued that they need not bother with teaching ethics, as it is unteachable and of little value to the legal academy.[135] Others, however, approach this issue from an examination of differences in the types of individual moral development and urge particular approaches to learning.[136] While most lawyers learn the rules to comply with them, others become familiar with standards to be able to successfully[137] circumvent them.[138]

Even with the best intentions, learning ethics is not just learning information or rules in the abstract. Teaching ethical, professional behavior involves more than a memorization of the rules or even their specific application. While this approach is a good start, ethical conduct often arises from foundations of one's conduct. As a result, additional methods, such as those focused on personal awareness, are necessary, even though such approaches are difficult to implement.[139]

B. *Usual Methods of Teaching Ethics*

In law schools, many ethics or professional responsibility courses are large upper class offerings in which the primary focus is on learning the substance of ethical standards.[140] Learning the rules, often through memorization, remains a dominant method of education.[141] A review of the consequences of an individual's failure to comply with the standards also serves as a basis of study. The body of cases which have accumulated through courts and the disciplinary boards of the bar association of each state are read and discussed. Course books outline the issues that serve as the basis

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[135] *See* Pearce, *supra* note 18, at 725–26; Cramton & Koniak, *supra* note 134, at 146–47 ("Many law school faculties remain convinced that the subject [of legal ethics] is unteachable or believe that it is not worth teaching.").

[136] *See generally* Hartwell, *supra* note 132 (arguing that law school is not properly developing law students' moral sensibilities, especially as compared to other graduate students).

[137] While the term "success" is relative, it is used in this instance to signify the avoidance of a sanction.

[138] As one former student proudly explained to me, he was interested in the Professional Responsibility Course so that, in practice, he would know just how close to the "line" he could go without "getting caught."

[139] Louise Phipps Senft, *The Interrelationship of Ethics, Emotional Intelligence and Self Awareness*, ACRESOLUTION, Spring 2004, at 20, 20–21.

[140] Lisa G. Lerman, *Teaching Moral Perception and Moral Judgment in Legal Ethics Courses: A Dialogue About Goals*, 39 WM. & MARY L. REV. 457, 459–60 (1998).

[141] *See id.* at 469 (describing the "positive law" approach in which a teacher focuses on having students learn the standardized ethical principles, such as the Model Rules of Professional Conduct).

for further deliberation and Socratic dialogue. Assessment mechanisms are primarily focused on the knowledge of rules.[142] In addition, even in practice lawyers apparently can learn to be ethical—online.[143]

Admittedly several professors have strongly urged and implemented innovative approaches to teaching ethics.[144] Yet for the most part, it still remains a subject treated as a large class and one that law students must take in order to graduate.[145] For example, most courses follow a standard track of examining the rules and how they are applied and enforced.[146]

In other professions, engineering for example, ethics are learned through methods which utilize video tapes and interactive DVDs.[147] This approach allows the students to virtually experience potential dilemmas, evaluate them and proceed through necessary steps to resolve them. Such approaches provide individuals more realistic situations that assist in integrating conduct with knowledge. In a discipline such as mediation, where the focus is almost exclusively on interpersonal dynamics, a primary emphasis of teaching should be interactive. While many of the general mediation training courses

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[142] *See id.* For example, the Multistate Professional Responsibility Examination (MPRE), which all law students must take to demonstrate knowledge of professional responsibility, consists of sixty multiple-choice questions that must be answered in two hours. National Conference of Bar Examiners, Multistate Tests, http://www.ncbex.org/tests.htm (last visited Oct. 31, 2005). It seems unlikely that an individual's real moral judgment can be assessed in this manner.

[143] For example, the University of Texas School of Law's Online and Continuing Legal Education website sells online professional responsibility course programs, such as Michael Sean Quinn's "11 Commandments of Professional Responsibility." UT Law Online Learning Course Description: 11 Commandments of Professional Responsibility, http://www.utcle.org/courses/descr.php?course=LEW01 (last visited Oct. 31, 2005).

[144] *See generally* Hartwell, *supra* note 131 (discussing Professor Hartwell's implementation of an "experiential professional responsibility course," focusing on fostering moral growth through real experience); Lerman, *supra* note 140 (describing innovative approaches to teaching legal ethics while noting difficulties in the implementation process).

[145] Lerman, *supra* note 140, at 459.

[146] *See* Christine Mary Venter, *Encouraging Personal Responsibility—An Alternative Approach to Teaching Legal Ethics*, 58 LAW & CONTEMP. PROBS. 287, 287–88 (1995).

[147] *See, e.g.*, National Society of Professional Engineers, PEPP Professional Development Courses, http://www.nspe.org/pepp/pp1-courses.asp (last visited Oct. 31, 2005).

are interactive,[148] little study has been done with regard to teaching methodology in isolated mediator ethics courses.[149]

C. *Suggestions for Innovative Approaches: Cognitive Considerations*

Assuming that ethical conduct can, at least to some degree, be learned, it is likely that innovative approaches will facilitate learning.[150] While traditional or conventional approaches to teaching have some merit, particularly in learning the actual rules or guidelines in professional codes, numerous other factors point toward the use of more interactive, experiential methods. An initial consideration of learning styles and methods provides a foundation for designing courses and workshops that are effective in assisting individuals in learning mediator ethics. In addition, adult learning principles demonstrate the need for variety in teaching. One of the more straightforward explanations of differences in learning addresses how individuals process information.[151] In learning, individuals use essentially three primary sensory modalities: visual, auditory (both verbal and aural) and tactile or kinesthetic.[152] Experts often urge that teachers use a variety of approaches so that each student is able to process information in the modality most effective for him or her.[153] And while each individual has a dominant method, most can still learn from the other approaches. Many teachers therefore, strive to present a mix of teaching methods. Those who teach mediator ethics should be cognizant of the variety in learning styles and attempt to address all learners with an assortment of approaches. For

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[148] *See, e.g.*, Texas Mediation Trainers Roundtable (TMTR), 40-Hour Basic Mediator Training Standards: Training Methodology, http://www.tmtr.org/StandardsFolder/40hr-training-outline.htm (last visited Oct. 31, 2005) (recommending that the methodology for the basic forty hour mediation training include lectures, role plays, and group discussions).

[149] The only real exception is my dear friend and colleague Mary Thompson who, for the last several years, has concentrated on just how ethics are taught and encouraged all of us, as members of the TMTR, to increase our knowledge and awareness of the assortment of teaching methodologies. *See generally* Mary Thompson, *Teaching Ethical Competence,* DISP. RESOL. MAG., Winter 2004, at 23 (describing several innovative training activities).

[150] *See generally* Lerman, *supra* note 140 (describing innovations in the teaching of legal ethics that result in more student engagement and a deeper understanding of ethical dilemmas).

[151] *See* M.H. Sam Jacobson, *A Primer on Learning Styles: Reaching Every Student,* 25 SEATTLE U. L. REV. 139, 146–49. (2001).

[152] *Id.* at 150–51. The other methods of absorbing information are the senses of taste and smell, which are not often considered in the context of learning theory. *Id.* at 151.

[153] *Id.*

example, visual aids such as overheads, handouts, and flowcharts are effective with visual learners; group work and discussions are valuable for auditory processors; and simulations and real case observation are most helpful for those more kinesthetic learners.

Experiential learning also serves a foundation for conducting the teaching of ethics in a manner that is more conducive for adult learners. The need for activity, rather than passive listening, is a fundamental tenet of adult learning,[154] as is a need for immediate application of principles.[155] These precepts point to the prevalent use of exercises and simulations. Additional factors that effect learning and, therefore, should be considered by instructors include psychological factors; emotional matters, such as motivation; the learning environment; and sociological factors.[156] Finally, instructors should assure that opportunities exist to engage in deliberate "metacognition." Metacognition, or thinking about thinking, has as its principle the reflective examination of thoughts and actions and encourages self-awareness.[157] Such reflections often also include deliberations about the learning process.[158]

D. *Sample Teaching and Training Methods for Mediator Ethics*

Admittedly, numerous specific methods can be used to provide individuals a solid knowledge base in mediator ethics. Conducting oneself ethically can simply be defined as behavior that corresponds to established guidelines or principles. One teaching approach dissects ethical behavior into the steps or phases an individual passes through when challenged by ethical issues. The design and use of corresponding educational activity to address each phase allows for an enhanced learning process.

This method of examining ethical conduct utilizes a systematic approach. A model composed of stages of conduct provides a structured paradigm for learning. Although in reality when one encounters an ethical dilemma, the stages are not so distinct and in most instances blend together, for initial learning an in-depth examination provides more organization. As a

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[154] Gerald F. Hess, *Listening to Our Students: Obstructing and Enhancing Learning in Law School*, 31 U.S.F. L. REV. 941, 943 (1997).

[155] Fran Quigley, *Seizing the Disorienting Moment: Adult Learning Theory and the Teaching of Social Justice in Law School Clinics*, 2 CLINICAL L. REV. 37, 47 (1995)

[156] Robin A. Boyle & Rita Dunn, *Teaching Law Students Through Individual Learning Styles*, 62 ALB. L. REV. 213, 224–225 (1998).

[157] *See* John M. A. DiPippa & Martha M. Peters, *The Lawyering Process: An Example of Metacognition at Its Best*, 10 CLINICAL L. REV. 311, 311 (2003).

[158] *Id.* at 312 ("A prime function of metacognition, particularly for students and educators[,] is increasing awareness of learning processes.").

result, individuals are better able to understand each of the steps to follow when addressing potential ethical dilemmas.[159]

One proposed model consists of six stages of conduct, each of which is examined. Suggested exercises and activities that correspond to each phase follow the discussions. These teaching elements allow individuals to explore each phase and to apply knowledge and skill at each level, providing a more concrete and comprehensive method for learning ethics.

1. *Specific Elements of Ethical Conduct*

The first step in determining ethical conduct is the ability to recognize an ethical problem or potential challenging situation. While general class discussions and lectures make such information available, hearing about a possible matter in the abstract differs significant from meeting it in reality. The need for mediators to immediately recognize ethical dilemmas is imperative. In discussions with colleagues about ethical cases, many report that the mediators were unaware that an ethical dilemma or situation had arisen.

Once an individual recognizes and understands that an ethical dilemma is present, the next stage necessitates awareness and knowledge of the rule(s) or guideline(s) that applies to the given situation. This involves not only an awareness of the existence of the rule, and its specific content, but also how the standard applies in the particular situation. In many instances, however, it is not a single rule, but rather a combination of standards that may, together, indicate the proper conduct. In addition, there are those guidelines that have broad applicability[160] and, therefore, may serve as a default if no others are directly instructive. While rules or standards in isolation often appear quite obvious and unambiguous, in reality situations are not often very clear and distinct. Thus, in many cases, individuals must consider several issues that could be addressed by the standards or code provisions. Moreover, it is not unusual that some directives may be in conflict with one another. For example, in the lawyers' Model Rules of Professional Conduct, Rule 4.1 provides for truthfulness.[161] The commentary, however, allows the door to be

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[159] This approach is also consistent with learning mediation skills generally. In most mediation books and training materials, the process is broken down into distinct stages for teaching even though in reality the lines between many of the stages are often blurred. *See* KOVACH, *supra* note 2, at 34–35.

[160] *E.g.*, BOMA Code of Professional Ethics and Conduct, *supra* note 33, Art. I (providing that all members should conduct themselves in a professional manner).

[161] MODEL RULES OF PROF'L CONDUCT R. 4.1 (2002).

open to puffery or even lying in negotiation.[162] Yet another rule, Rule 8.4, appears to provide a clear mandate of honesty, noting "[i]t is professional misconduct for a lawyer to . . . engage in conduct involving dishonesty, fraud, deceit or misrepresentation."[163] Mediator codes likewise may have some variance in terms of duties and standards. For example, some standards are quite clear, such as the prohibition of contingency fees.[164] Others, however, particularly when read together, could be interpreted as inconsistent. The most common is the tension between party self-determination and not providing advice.[165] For example, the standards mandate party self-determination yet also include limitations on providing advice or information.[166] In those cases where a party is unaware of the information necessary to make a decision, the mediator is in a quandary. Mediators must then make individual decisions on a case-by-case basis.

Once the particular standards are identified, the next stage involves an analysis of the application of the rule(s) to the particular problem or issue. Consideration of alternatives, along with consequences of each choice, provides a method to assess available courses of action. As several different alternatives may be appropriate or certainly not prohibited by the standards, the mediator must then make a decision within the framework of the guidelines and his own moral compass.

At the decision-making phase, individuals must make a definitive resolution concerning a course of action. In some instances, the answer is quite clear and no further information is necessary. In other situations, however, additional information or knowledge is desired or needed to reach a final conclusion. Once the requisite information is gained, then a synthesis of sorts occurs to process the actual selection of conduct. In some cases, another part or segment of the decision-making process calls for a consultation with others in an effort to assess, debate, and discuss the issues. In doing so,

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[162] Alfini, *supra* note 56, at 266–68.

[163] MODEL RULES OF PROF'L CONDUCT R. 8.4(c) (2002).

[164] MODEL STANDARDS OF CONDUCT FOR MEDIATORS Standard VIII(B) (2005). Note, however, that the 1994 version of the Model Standards contained much stricter language on contingency fees and that some commentators had advocated that contingency contracts should be permissible. *See, e.g.*, Scott R. Peppet, *Contractarian Economics and Mediation Ethics: The Case for Customizing Neutrality Through Contingent Fee Mediation*, 82 TEX. L. REV. 227 (2003). As a result the current revised Model Standards has more general language. *See* STULBERG, *supra* note 27, at 20.

[165] Nolan-Haley, *supra* note 64, at 776–77 ("The discourse of consent suggests that autonomy and its legal equivalent, self-determination, longstanding values in Anglo-American jurisprudence, are central values in mediation. My claim, however, is that the absence of informed consent in mediation undermines this commitment to autonomy.").

[166] MODEL STANDARDS OF CONDUCT FOR MEDIATORS Standards I & VI (2005).

individuals acquire the benefits of a more consultative approach. Once a decision is made, the individual must then demonstrate conduct in accordance with that decision or, in other words, immediately implement the action decided upon.[167] Reflections upon the decision made, the actions taken, and the resultant ramifications are also necessary so that each situation can be used as a method for self-reflective learning.[168]

A final matter, which is a key element but rather difficult to teach, involves self-awareness of moral boundaries.[169] In learning and appreciating ethics, educational experiences should also provide opportunities that allow individuals to enhance self-awareness of their conduct. As a part of the metacognition facet of learning, mediators can become better able to appreciate fine distinctions and choices in practice. Self-awareness is an integral part of mediation generally and, thus, should be highlighted in any consideration of ethics. This approach also allows for self-directed learning, which is another element of adult education.[170] In reality, a combination of all the prior illuminated stages or elements take place. While these phases are examined in isolation for learning, in real situations they do not occur in isolation but rather almost simultaneously. Therefore, in ethics courses, a final exercise, used for 'putting it all together,' should be provided so that participants understand how all the dynamics collectively merge. The use of simulations and, in some instances, real cases[171] are effective in this regard.

2. *Suggested Teaching Methods and Activities*

In structuring courses to address mediator ethics, instructors can employ a number of different exercises and activities that are conducive to learning. These suggestions are provided, not as a prescription for teachers and

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[167] Thompson, *supra* note 149, at 23.

[168] Self-reflection is often noted to be an essential part of professional growth and competency. *See, e.g.*, Richard K. Neumann, Jr., *Donald Schön, The Reflective Practitioner, and the Comparative Failures of Legal Education*, 6 CLINICAL L. REV. 401 (2000) (citing Schöns legendary works, DONALD SCHÖN, THE REFLECTIVE PRACTITIONER: HOW PROFESSIONALS THINK IN ACTION (1983) and DONALD SCHÖN, EDUCATING THE REFLECTIVE PRACTITIONER: TOWARD A NEW DESIGN FOR TEACHING AND LEARNING (1987)).

[169] *See* Senft, *supra* note 139, at 20 (examining the matter of emotional intelligence as it relates to mediator ethics).

[170] Quigley, *supra* note 155, at 48–49.

[171] Since the importance of confidentiality cannot be overlooked, mediators often change the names and other identifying information so that real cases can be instructional while, at the same time, confidentiality can be maintained.

trainers, but rather as a means to initiate additional thinking and inspiration about the subject.

The first phase calls for an initial, and almost immediate recognition of situations that present an ethical dilemma. When highlighting the identification of a problem or potential challenging situation, one basic approach is the use of video, either short clips or an entire mediation.[172] At this juncture, the focus is on instant recognition that a problem or dilemma exists. But this phase must not be overlooked. Too often in the case of mediator ethics, at least with regard to anecdotal reports of alleged mediator misconduct, many practitioners appeared to be unaware that they had encountered an ethical issue. This may be due, in part, to the fact that little ethical education has taken place. Focus on this phase, therefore, is quite critical to practice and development of the profession. Discussions and readings can also be used, although these are not as useful in providing hands-on learning and awareness, which is necessary in practice.

Phase two consists of a basic examination of the knowledge of the applicable rules, or alternatively, their absence. This encompasses not only the knowledge of the specific content of all enacted ethical rules or standards, but also how they may interact with one another. This can be accomplished through the use of lectures, testing, and reading assignments. These approaches are generally the most common in general ethics courses. It is also worth considering other methods—ones in which the learners can also have fun. Developing and conducting instructional games and exercises provide an additional means for learning. In "ethical jeopardy,"[173] the game show is adapted to assess the knowledge base of participants. "Answers" are provided with points allocated in accordance with a graduated level of difficulty. The participants must then select the answer and have ten or twenty seconds to provide the question. The game can be played with individuals or alternatively in groups or teams. Likewise in "Who Wants to be an Ethical Mediator?" (an exercise modeled after the television program) participants are given an ethical situation and four optional responses or solutions from which to choose. They must answer the specific question, which in some cases has led to larger discussions, especially in those cases where the directives are not clear. Each question is assigned points corresponding with the level of difficulty. This exercise can be played with individual participants, or if time and facilities allow, trainees can be placed in groups. The various help options that are used with the television game can also be integrated into the exercise. Allowing the participants to choose

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[172] While few videos are currently available that highlight these aspects, they could easily be made.

[173] Thompson, *supra* note 149, at 23.

assistance by using a 50-50, "phone a friend," or "ask the audience" adds another layer to learning, although this additional element certainly makes the exercise more complex and time consuming. In essence, at this phase the focus is on assessing basic knowledge of the rules or standards. Another less instructor-intensive exercise that also focuses on general knowledge involves break out or discussions groups. Members of each group examine the different codes of ethics that have been enacted and compare and contrast their content.[174] Specific questions can be posed or alternatively group members can engage in a more general discussion.

Once the applicable rules or standards are identified, several exercises can be used to direct attention to a determination of which standard(s) may apply in a given situation. In some dilemmas, once a rule or standard is identified and applied, the course of conduct becomes clear. In other cases, however, a course of action is not apparent and straightforward. This is particularly true where several standards have applicability or in those instances of apparent conflicting directives. As a result, matters often must be analyzed in greater detail with additional consideration of the options. Group discussions and stop-action role-plays, whether live or through a prior recorded videotape, are quite constructive in this phase. When exploring phase three, a consideration of the consequences of alternative approaches or courses of conduct, a variety of activities can be utilized. For example, case studies, war (or peace) stories,[175] video, and case law all provide awareness of the possible outcomes and the likely predicted consequence of such selections. During this phase students should be able to recognize that the need to consider the various options for appropriate conduct still remains. Participants can thoroughly examine consequences of choices by considering and discussing those instances where they would be willing to take risks. Outlining and defining the limits of unacceptable conduct for each individual provides another method to emphasize alternatives.

To emphasize the fourth phase, that is, applying decisions to the case at hand, a decision-tree based discussion[176] provides a basis for making choices. Essentially the steps of decision-making are outlined and applied to a specific example. Thompson also suggests the use of "Where Do You Draw the Line?" exercise, where a variety of potential ethical beliefs and options are presented.[177] Trainees are instructed to discuss just where the line

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[174] Id..

[175] Carrie Menkel-Meadow originally used this term when she, upon relating how lawyers often instruct others by providing war stories, suggested that mediators should begin telling *peace stories*.

[176] Thompson, *supra* note 149, at 23.

[177] *Id.*

of acceptable conduct is drawn for them, including the rationale relied upon.[178] Another variation examines the consequences of conduct after the fact. In "Defend Yourself," yet another exercise designed by Thompson, participants conduct a simulation of a mediator grievance process.[179] (This of course ties in with the prior discussion of an enforcement process, and, time permitting, can lead to a discussion of disciplinary methods.) During the exercise, one individual assumes the role of a mediator who is responding to or defending a complaint. Several other participants assume the role of grievance committee members, while others could be placed in the role of complainant, lawyers, etc. In this exercise, some time should be allocated for preparation, particularly if a formal grievance procedure is simulated.

The next phase, implementation, or the ability to conduct oneself in accordance with the decision, is also a critical phase of learning ethical conduct. As individuals need practice, this segment should not be overlooked. There are fundamental differences between abstractly stating that information is known and understood and the ability to execute the conduct dictated by such knowledge. At this juncture, reliance is nearly exclusively on a role-play or simulation format. Another method that examines implementation as well as introduces the idea of self-reflection is the use of videotaping and playback. The mediator is videotaped conducting a simulation where ethical dilemmas are presented. She must quickly make decisions and act in accordance with her choices, (i.e., implementation). Thereafter, she is given the opportunity to watch herself on video and analyze the choices made and applied.[180] If the conduct is incongruous with the decision made, mediators should be provided additional opportunities to practice conforming conduct. Another option consists of a video examination given to the student.[181] In this exercise or test, a video of a mediation is shown with questions such as "what should the mediator do now?" or "what principle should apply?" intermingled throughout the tape. Participants are provided just a few minutes to answer the questions posed. Alternatively, each question could serve as the basis of group discussion.

Time should also be allotted for the reflective portion of learning, which calls on metacognition to think and reflect upon the matters learned.[182] Approaches that can be used in this regard include tools such as student

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[178] *Id.*

[179] *Id.*

[180] For a detailed examination of the use of video in testing and evaluating students, see Kimberlee K. Kovach, *Virtual Reality Testing: The Use of Video for Evaluation in Legal Education* 46 J. LEGAL ED. 233 (1996).

[181] *Id.*

[182] DiPippa & Peters, *supra* note 157, at 311.

journals or diaries, "coffee talk" or small group discussions. Mindfulness—recently suggested as a means for improving mediation, as well as many aspects of personal and professional life[183]—for lawyers and mediators could also be introduced to the participants during this segment. As self-reflection is a critical element of professional practice, all education programs should include opportunities such as these. Also, to enhance self-awareness, two additional exercises have been suggested. One identifies values that may influence how the mediation process is conducted. Participants are given various outcomes of mediations and are asked to stand next to those that present the most difficulty with neutrality.[184] They then discuss the matter with colleagues. Showing photographs to elicit reactions that may compromise neutrality is another means of awareness of personal biases.[185]

Finally, as noted earlier, in many instances, there may be numerous approaches that practicing mediators take in resolving ethical dilemmas. Illustrations of those situations where mediators may differ can be quite enlightening for participants. Such an exercise also simultaneously demonstrates what practicing mediators do, which is valuable. A game-like approach to understanding variations in practice, with particular emphasis on the different approaches and answers, can be instructive.[186] Awareness of what the majority of practitioners would do provides additional information to consider and digest. An adaptation to the game show Family Feud is the basis of this exercise. Preparation, if done as designed, involves an initial determination of what the majority of mediators would do in a given situation.[187] Issues would be posed to mediators. For example, one party (A) tells the mediator that if the matter is resolved in a favorable manner (specifying over $75,000), then "there are a lot more cases to mediate" in the future. How should one respond? After many mediators are surveyed, the top four or five answers would be compiled. When the issue is presented during the exercise, each team, or "family" would then have some time, as is done in the show, to discuss the matter with one another in an attempt to reach a consensus. Although on the show very little time is allocated for discussion, it is during the debate that additional learning takes place. Therefore, the training adaptation of the game should allow additional discussion time. Each

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[183] Leonard L Riskin, Mindfulness: Foundational Training for Dispute Resolution, 54 J. LEGAL EDUC. 79 (2004).

[184] Thompson, *supra* note 149, at 23.

[185] *Id.*

[186] This is one idea that came to mind while drafting this article. It is clearly in a rudimentary process of development but ideally will be completed and implemented in the near future.

[187] The author is currently working on a method to assess such information.

answer is assigned different points, depending upon the percentage of mediators who selected each response.

Examining past cases is another way to provide situations where decisions have already been made and can lead to effective discussions of "what you would do differently?" Initially a video or written transcript of a mediation leading up to the ethical dilemma is provided, followed by an overview of the mediator's action. Instructors should then include the consequences of the decision, perhaps midway in the discussion time. Such examinations can enhance the participants' appreciation for the significance of decision-making and consequences of outcomes. Certainly many other approaches to teaching and learning mediator ethics can be constructed. As the field or profession has recently embarked on a path toward emphasis on professionalism, no doubt ethics will continue to receive recurrent attention. With the various teaching or learning tools in place, attention should turn to the when and how of enhancing mediator ethics training. In other words, a brief consideration of how these approaches can be incorporated into training and teaching practices can stimulate progress toward further awareness and inclusion.

E. *Implications for Mediation Teaching and Training*

In recent years, as part of the move toward regulation, additional focus has been placed on the teaching and training of mediators.[188] A variety of methods and measures have been suggested as a means of quality assurance. These range from standardized testing, paper credentials, supervision, and performance-based assessment.[189] One often-suggested mechanism for quality control emphasizes the training and teaching of mediators. Specifically, it has been suggested that rather than certify or license

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[188] *See* Pou, *supra* note 11, at 316 n.83; Sarah Rudolph Cole, *Mediator Certification Has the Time Come?*, DISP. RESOL. MAG., Spring 2005, at 7, 10. Texas has been a leader in this regard through the creation of the Texas Mediation Trainers Roundtable in 1992. TMTR, A Brief History of Texas Mediation Trainers Roundtable, http://www.tmtr.org/AboutUs-Folder/brief%20history.htm (last visited Oct. 31, 2005). More recently, the Straus Institute for Dispute Resolution at Pepperdine University School of Law hosted a gathering in June 2005 to examine teaching mediation in law schools. *Upcoming Events*, RESOLUTIONS (Pepperdine U. School of Law Straus Institute for Disp. Resol., Malibu, Cal.), Fall 2004, at 16, *available at* http://law.pepperdine.edu/pdfs/resolutions2004.pdf. *See also* Joseph B. Stulberg, *Training Interveners for ADR Processes*, 81 KY. L.J. 977 (1992–93).

[189] Robert A. Baruch Bush, One Size Does Not Fit All: A Pluralistic Approach to Mediator Performance Testing and Quality Assurance, 19 OHIO ST. J ON DISP. RESOL 965, 965–66 (2004).

mediators, the training programs should be certified. As a result, the field has more closely examined the content or substance of mediation training.[190] Teaching and training methodologies should also be analyzed as part of this effort. The subject of ethics has generally been part of the basic mediation training, but is often considered as filler or merely an afterthought.[191] Most practitioners, trainers, and scholars have suggested that some treatment of ethics be incorporated into basic training programs.[192] Yet, as mediation has evolved and redefined what it means to mediate, many more components and aspects to the practice have developed. Complicating the matter even further is the fact that it is quite difficult, if not impossible, to cover all of the material in the brief amount of time devoted to a basic mediation training.[193] It is, however, essentially impossible to include an adequate treatment of ethics in the short timeframe of a basic training.[194] In general, to learn and better understand a new or different behavior,[195] individuals must first be aware of the elements and ramifications of the conduct. This encompasses a general understanding of the professional practice within which ethical considerations reside. Individuals should therefore first have a solid grounding in both the theory and skills of mediation prior to a consideration of ethics. As the mediation process is just being introduced to the participants, it may be overwhelming and confusing to then delve into complex ethical issues. Although some introduction to ethical principles should be included in the basic training, a separate and distinct training or educational program focusing solely on mediator ethics may be a better approach. To assure familiarity and compliance with enacted standards, a day devoted exclusively to ethical aspects of practice is one suggestion.

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[190] For example, at the Pepperdine workshop, the deliberations surrounded how closely the mediation approach or style that is taught in the law school arena mirrors that which takes place in everyday practice of the mediation of litigation cases.

[191] Pou, *supra* note 13, at 204; *see also* Welsh & McAdoo, *supra* note 18 (arguing that many mediators place organizational loyalties and client relationships ahead of professional ethics).

[192] Pou, *supra* note 13, at 204, 214.

[193] Debate exists about the time allotment. Bobby Marzine Harges, *Mediator Qualifications: The Trend Toward Professionalization*, 1997 B.Y.U. L. REV. 687, 704–08. *See generally* Brien Wassner, *A Uniform National System of Mediation in the United States: Requiring National Training Standards and Guidelines for Mediators and State Mediation Programs,* 4 CARDOZO ONLINE J. CONFLICT RESOL. 3 (2002).

[194] Many basic mediation trainings are a mere forty hours in length. While some have urged a more in-depth approach to mediation training, for the most part, training remains a very succinct educational experience.

[195] This of course is not to say or imply that mediators are unethical but rather that any conduct in mediation is often new to those first trained.

In addition to an incorporation of the ethics piece in the basic mediation training and stand-alone courses, professionalism efforts point toward additional focus on ethical aspects of practice. For example, in Texas, a voluntary non-profit organization has recently established a voluntary certification or qualification process, with a strong emphasis on ethics.[196] Specifically, the requirement provides that mediators must attend three hours of ethics training in order to maintain their status as a credentialed mediator.[197] Maryland, in its examination of quality control and credentialing, has also recommended an emphasis on ethical principles.[198]

In general mediation courses, most teachers and trainers utilize a fairly balanced combination of educational methods and approaches. Moreover, the Texas standards, which were likely the first to prescribe the content for the forty-hour training, included not only suggested content matters, but also recommended methods of teaching,[199] noting that a mixture of approaches and teaching methodologies is most desirable. Such variations should also be included in the teaching of ethics.[200] It may be valuable to consider such approaches for application to all teaching of ethics, not just mediation.[201] Ethical training in an effective manner should be required of all mediators, and trainers and teachers must initiate these efforts.

V. FUTURE CONSIDERATIONS

While a great deal of commendable progress has been made in setting out ethical guidelines for mediators and establishing credibility in the field, the need to examine and consider additional facets of professionalism remains. The mediation field is clearly in the process of a quest for such recognition.[202] Some remain quite tolerant of ambiguity with regard to

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[196] *See* Texas Mediator Credentialing Association, Criteria on Credentials, http://www.txmca.org/criteria.htm (last visited Oct. 31, 2005).

[197] *Id.*

[198] Pou, *supra* note 13, at 219 n.97; Charles Pou, Jr., *Mediation Trainers Focus on Ethics*, MACROSCOPE (Md. Mediation & Conflict Resol. Ofc., Annapolis, Md.), Jan. 2005, at 1, *available at* http://www.courts.state.md.us/macro/macroscope.pdf.

[199] *See supra* note 148.

[200] *Id.*

[201] I realize however, that I was not asked to comment on the teaching of ethics generally, or even in the more related profession of law. Nonetheless, in considering the topic with regard to mediation, I cannot help but consider how such approaches might also be more generally applicable to the teaching of legal ethics on the whole.

[202] Welsh & McAdoo, *supra* note 18, at 13 ("It seems that dispute resolution practitioners, especially mediators, now seek the status and autonomy that society grants

standards and quality matters,[203] while others urge more attention to the subject and warn of the potential serious consequences of inattention to standards.[204] As the pursuit of professionalism continues, mediators must not only follow what others have done regarding policies and procedures, but should also assume a leadership role in the movement toward a more comprehensive approach to ethics in dispute resolution and problem solving. As mediation moves from an adversarial, win-lose, right-wrong determination of events toward collaborative problem solving, so too should the focus of ethics. The mediation profession is evolving and becoming an innovative leader in the quest for a more peaceful and nonviolent world. Individuals and groups are learning to begin early on to work together in an effort to solve problems. Professionalism efforts should likewise be innovative and collaborative. In doing so, mediators could play a pivotal role and guide the way in innovative considerations of ethics.

Ethical conduct has become a topic demanding national, perhaps international, attention. The subject is relevant not only in the legal arena but also holds significant importance in business[205] and politics.[206] This additional focus or renewed interest in ethics is a result, in part, of events such as the Enron collapse and the WorldCom debacle.[207] The enactment of the Sarbanes-Oxley Act by Congress[208] points toward a time where ethical

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to lawyers, accountants and doctors. Mediators have attempted to adopt many of the characteristics that distinguish professions from occupations.").

[203] Pou, *supra* note 13, at 222.

[204] *See generally* Michael Moffitt, *Ten Ways to Get Sued: A Guide for Mediators*, 8 HARV. NEGOT. L. REV. 81 (2003) (detailing the growing legal consequences that mediators face for ethical or professional lapses).

[205] *See generally* Joshua A. Newberg, *Corporate Codes of Ethics, Mandatory Disclosure, and the Market for Ethical Conduct*, 29 VT. L. REV. 253 (2005) (describing the status and impact of ethical guidelines in the corporate context).

[206] For example, a number of high-profile political leaders have recently been implicated in what can be fairly described as alleged ethical lapses, ranging from the allegations against Tom DeLay regarding improper campaign financing to an investigation into Senator Bill Frist's possible inside trading to investigations of leaks of classified information by White House staffers. *See* Robin Toner, *The DeLay Inquiry: The Context*, N.Y. TIMES, Sept. 29, 2005, at A1.

[207] *See generally* Lawrence A. Cunningham, *The Sarbanes-Oxley Yawn: Heavy Rhetoric, Light Reform (And It Just Might Work)*, 35 CONN. L. REV. 915 (2003) (providing an overview of the corporate scandals, including Enron and WorldCom, that led to a focus on corporate ethics and Congressional action).

[208] Sarbanes-Oxley Act, Pub. L. No. 107-204, 116 Stat. 745 (2002). This act was passed, in large part, as a reaction to high-profile corporate scandals, such as those facing Enron and WorldCom. Cullen M. "Mike" Godfrey, *The Revised Role of Lawyers after Sarbanes-Oxley*, 68 TEX. B.J. 932, 933 (2005).

conduct is a requirement of doing business. In so doing, we have placed the subject of ethical conduct at the forefront of awareness for the general public. Ethics is a pervasive topic in all types of matters, professional and practical. More energy must be devoted to considering these impacts upon mediation, as well as the converse, that is, how mediator ethics can impact others.

Mediators can, and should, take a leadership role in setting examples of more principled conduct. By demonstrating greater belief in, and commitment to, honest and forthright negotiations, mediators can begin to persevere in the movement toward more peaceful and respectful dealings. With new and enforceable standards, mediators can effect change. Such efforts can impact and transcend all areas of mediation practice. Most likely the initial effect will be observed in the legal arena. By focusing on the educational aspects of ethical practice, we can also assure that most mediators are not just aware of ethical precepts, but also have integrated them into their work. By their conduct, mediators not only set examples, but also educate others in ethical (non-deceptive) negotiation and deal making.

In this way, positive impacts will be felt in not only the mediation profession, but also in others, such as law and business, and perhaps by the general public. Mediators have led a pioneering movement and made great progress for nearly thirty years. It is now time to renew our energy. Such efforts will have a favorable impact upon the profession. Ideally, all others who come into contact with mediators will also be positively inspired. By modeling a collaborative commitment to ethics, the mediation profession may blaze a new trail for others to follow.